

**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI**

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM**

आयकरअपीलसं/ I.T.A. No.2663/Mum/2018  
(निर्धारणवर्ष / Assessment Year: 2001-02)

Mr. Rajeev Sheth 37/A, Villa Ramona, Nepeansea Road, Mumbai-400036	<b>बनाम/</b> Vs.	Income Tax Officer- 16(2) (4) Aayakar Bhavan, M.K. Road, Mumbai
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AAFPS7760Q</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri .B.V Jhaveri	
Revenue by:	Shri. T. Sankar, CIT DR	

सुनवाईकीतारीख / Date of Hearing: 28/10/2022  
घोषणाकीतारीख /Date of Pronouncement: 14/12/2022

**आदेश / O R D E R**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against order of the Ld.CIT(A) dated 21.02.2018 for A.Y. 2001-02.

**2. The Grounds of appeal raised as under:**

1. Your appellant submits that the respected Assessing Officer is not justified in considering incremental closing stock for matching GP ratio with preceding year. The details pertaining to valuation of closing stock comprising of prices of high and low quality diamonds were furnished before the Assessing Officer. The closing stock comprises mainly of low quality diamonds and hence, was valued accordingly. The addition by the Assessing

Officer on estimation basis is bad in law just to match the GP ratio for the earlier year."

2.

**3.** Brief facts is that the appellant is an individual carrying on the business of 100% export of cut and polished diamonds in the name of M/s. Divya Jewels. During the previous year ended on 31 October 2000 (A Y 2001-02), the proprietary concern of assessee viz, M/s. Jewels was taken over by M/s. Divya Jewels International Private Limited (from the close of business hours on 31 October 2000). With the return of income for A. Y. 2001-02, the appellant had filed tax audit report and audited accounts of the proprietary concern, M/s. Divya Jewels upto 31<sup>st</sup> Oct, 2000 and in that the appellant had disclosed closing stock of cut and polished diamonds weighing 1540.85 carats (as on 31<sup>st</sup> Oct, 2000). The appellant had declared ratio of gross profit (GP) to turnover at 8.35% and net profit (NP) to turnover at 6.29%. The profit and loss account and balance sheet of the proprietary concern (M/s. Jewels) for the year ended 31 October 2000 were filed with the return of income. The appellant had also filed before the AO the details of purchase of cut and polished diamonds as well as details of back to back sale (export) of cut and polished diamonds. In the course of the assessment proceedings, the assessee also filed a statement giving details of purchase of diamonds from each of the parties and corresponding sale out of the said purchases and the closing stock from the said purchases and its valuation as on 31 October, 2000 (Pages 33

to 35 of PB). The appellant brought to the notice of AO that as on 31<sup>st</sup> Oct, 2000, he had purchased cut and polished diamonds by entering into forty (40) different transactions. As there was no opening stock, out of the aforesaid purchases, the export/sales were effected by the appellant by fifty six (56) transactions and of forty (40) transactions of purchases in respect of ten (10) transactions there was a closing stock of cut and polished diamonds as on 31 October. 2000. The said closing stock was valued at the purchase cost of the appellant. However, the AO did not accept the valuation adopted (i.e. cost) of the closing stock of diamonds [*because assessee's G.P. has fallen from previous assessment years*] by observing (only relevant portion) as under: -

".....On perusal of the details filed by the assessee along with P & L A/c. and balance sheet it is seen that the assessee has valued the closing stock of the prop. concern as on 31-10-2000 at Rs.61,02,905/-. The valuation was done upto 31-10-2000 as the Prop. concern of assessee was taken over by M/s. Divya Jewels International Pvt. Ltd. on 1-11-2000."

" ...On perusal of the details of closing stock filed by the assessee it is seen that the value of closing stock is stated to be taken at average rate in respect of each items of diamond lying in the stock. The assessee was asked to furnish the method and working of average rate of each item and also to support it by documentary evidence. However the assessee neither filed the

working of closing stock of each items nor as furnished any evidence to justify the valuation adopted. It is pertinent to mention here that the gross profit ratio of the assessee has fallen from 17.09% of earlier year to 7.93% of the year under consideration....."

4. Thereafter the AO observed that from the details of purchases, sales and closing stock furnished by the assessee along with the tax audit report, the average cost of purchases, sales and closing stock per carat is worked out as under:

Item	Quantity (ct.)	Amount (Rs.)	Average cost per ct. (Rs.)
Purchases	7060.74	4,23,26,465	5,994.62
Sales	5519.89	4,10,94,104	7,444.73
Closing stock	1540.85	61,02,905	3,960.73

1. On the basis of the aforesaid, the AO held that valuation of closing stock is not proper and is under-valued. Thereafter the AO arrived at gross profit margin of 16% as under:

Sales	=	Rs.7,444.73 per ct.
Purchases	=	Rs.5,994.62 per ct.
Add expenses	=	Rs.260 per ct.
GP	=	Rs.1,190.11 (7444.73- 5994.62-260)
GP margin	=	16%

5. Therefore, the AO applied the gross profit margin of 16% to the sales turnover of Rs.4,10,94,104/- and arrived at gross profit of Rs. 65,75,056/-. The appellant had declared gross profit of Rs. 34,32,598/-. Therefore, the AO added differential amount of Rs. 31,42,458/- (Rs. 65,75,056/- - Rs. 34,32,598/-) as the income of the appellant on account of under-valuation of closing stock and passed the assessment order u/s 143(3) of the Income Tax Act, 1961 (hereinafter "the Act") on 31.03.2004.

6. Aggrieved by the aforesaid action of AO, the assessee preferred an appeal before the Commissioner (Appeals) (Ld. CIT(A)) on 28<sup>th</sup> April, 2004. To support the grounds of appeal, the assessee filed paper book (PB) and written submissions before the CIT(A) on 30<sup>th</sup> April, 2005. The Ld. CIT(A) vide his letter dated 31<sup>st</sup> January, 2006 asked the AO/ACIT-16(2), Mumbai, to file his remand report on the basis of the paper book and the written submissions filed by the appellant before him. Even though the Ld. CIT(A) had directed the AO to file his remand report by 8<sup>th</sup> March, 2006, the AO after a period of twelve (12) years informed the Ld. CIT(A) on 11<sup>th</sup> February, 2018 that the records of the assessee for A.Y. 2001-02 are not traceable. The Ld. CIT(A) thereafter passed the impugned order on 21<sup>st</sup> February, 2018 wherein at para 6.1, he extracted the written submissions of the appellant and in Para 6.2 of the order, the Ld. CIT(A) observed as under;

".....During the appellate proceedings, the aforesaid written submissions of the assessee consisting of 6 pages were forwarded to the AO vide this office letter dated 31.01.2006 to re-examine the issue of valuation of closing stock in the light of the aforesaid submissions of the assessee. After several reminders, the AO had submitted a letter dated 11.12.2018 (correct date is 11.02.2018) stating that the records were not available. *It may be mentioned here at the cost of repetition that even during the appellate proceedings, no documentary evidence has been submitted by the assessee to justify valuation of closing stock done by him. In view of the above, since the appellant has not submitted any documentary evidence to establish that the AO was not correct in estimating the GP and the AO having based his estimation on figures provided by the assessee only, I do not see any reason to interfere with the order of the AO making addition of Rs. 31,42,458/- to the closing stock. Thus addition of Rs. 31,42,458/- made by the AO is confirmed.*"

7. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

8. Before us, the Ld. AR of the assessee contested the averment/assertion made by the Ld. CIT(A), that assessee did not file any documentary evidence to justify the valuation made by AO and therefore he had no other alternative but to uphold the action of AO. The Ld. AR pointed out that the assessee had filed paper book and written submissions before the

CIT(A) as early as on 30<sup>th</sup> May, 2005. And on 31<sup>st</sup> January, 2006, the Ld. CIT(A) had called for remand report from the AO. And after a period of twelve (12) years, the AO replied to the Ld. CIT(A) on 11<sup>th</sup> February, 2018 that the records of the assessee for A.Y. 2001-02 are not traceable. The Ld. CIT(A) further pointed out that though the Ld. CIT(A) extracted the written submissions of the appellant in his impugned order, did not take into consideration the averments made in the written submissions and decided the appeal of the appellant after a period of 12 years from the date of filing the appeal only on the ground that the appellant had not filed any documentary evidence to justify the valuation of closing stock which is per se contrary to the facts on record. According to Ld. AR, the Ld. CIT(A) overlooked the details of purchases, details of sales and the chart giving details of purchases, details of back to back sale (export) and the closing stock details showing its value at cost price. The Ld. AR submitted that whatever was purchased during the year under consideration was only up to 31<sup>st</sup> October, 2000 of which what has remained in the closing stock was valued at the Cost price only and the proof of the same was given twice in the course of the assessment proceedings; once with the letter dated 23 January, 2004 with the complete details of purchase and sales were furnished; and secondly, with the chart at pages 33 to 35 were filed in the course of the assessment proceedings before the AO which explains that against each transaction of purchase of cut and polished diamonds there was a corresponding export sales and what had remained as on 31<sup>st</sup> October, 2000 out of the said purchases were valued at cost. Therefore, the closing

stock of 1540.85 cts. of cut and polished diamonds was valued at Cost only; and brought to our notice that all the details which were called for by the AO were furnished including the chart at pages 33 to 35 of the paper book. According to Ld. AR, the delay caused by the AO to reply to Ld. CIT(A) ie. twelve (12) years (for not giving remand report on the plea that files of assessee for AY. 2001-02 was not traceable) has handicapped the assessee from producing all the invoice copies (purchase) when the bench was asking for it; and drew our attention to the observation in such a context by the Madras High Court in case of S. Hastimal v. CIT (49 ITR 273) wherein the Hon. High Court observed as under:

"It must be noted that the proceedings under section 34 were started in the year 1957 calling upon the assessee to explain a capital credit in his favour in the books of account for Hastimal Jayantilal and Co. made in the year 1947. The difficulty on the part of any assessee to explain a transaction which is a decade old has to be borne in mind by the department and should under no circumstances be under-estimated or taken advantage of by them. ...."

**9.** According to Ld. AR, if the AO had submitted the remand report to the Ld. CIT(A) in the year 2006 or in another one or two years, this appeal of assessee which pertains to A.Y. 2001-02 would not have been filed in the year 2018 and argued in the year 2022 before us. And therefore, the delay of twelve (12) years caused by the omission/lackadaisical attitude on the part

of the AO cannot be used against the assessee for confirming the addition on the ground of gross profit because the appellant could not produce all invoices of purchase and sale before the Ld. CIT(A) in the year 2018 and which could have been produced in 2006/07 to the satisfaction of the AO (during the remand report proceedings).

**10.** Coming to the merits of the addition (*closing stock of diamonds*) the Ld. AR, further submits that the average cost of diamonds purchased by the appellant adopted by the AO at Rs.5,994.62 per ct. while valuing the closing stock was erroneous and contrary to the facts on record inasmuch as, as per the details of purchases given in the assessment proceedings and in the chart at pages 33 to 35, out of total purchases of 7060.74 cts, the appellant had sold 5519.89 cts and thus 1,540.85 cts remained in the closing stock. The cost of purchase of 5519.89 cts was Rs.3,62,23,559.27, i.e., average rate was Rs.6,562.36 per ct. According to Ld. AR, what the AO did was to divide 7060.74 cts of diamonds purchased at the total cost of Rs.4,23,26,465/- and arrived at the average cost of Rs.5,994.62 per ct. Which computation of AO according to Ld. AR was erroneous. As against that, Ld. AR submitted that the complete details of diamonds purchased were given, from which the export sales were effected and therefore, according to him, the AO ought to have worked out the average cost of diamonds per ct. at Rs.6,562.36 which were exported. And therefore according to Ld. AR, the working of gross profit (GP) of 16% by the AO is incorrect and contrary to the facts on record.

**11.** Further according to Ld. AR, the sale price per ct was Rs.7,444.73 and the purchase price was Rs.6,562.36 per ct which gives gross profit of Rs.882.37 per ct is 11.88% as per the method adopted by the A.O. The Ld. AR further submitted that the fallacy in the working of the gross profit (GP) margin of 16% is that though average cost per ct of diamonds to the appellant was Rs.5994.62 per ct, it is common knowledge that all the diamonds were not of the same value. It was pointed out to us by the Ld. AR that the assessee had purchased diamonds which were worth Rs.7.994.62 per ct. and there were diamonds of Rs.3,994/- per ct. According to Ld. AR, the fallacy of AO while computing G.P at 16% was because, he valued the closing stock of diamonds at Rs.5,994.62 per ct. The case of the appellant is that out of 7060.74 cts of cut and polished diamonds purchased by assessee, the high value diamonds were exported during the year and what remained in the closing stock as on 31 October, 2000 were of low value diamonds (in comparison to the diamonds exported during the period ended on 31 October, 2000). This fact according to Ld. AR is proved by the cost of purchase of diamonds which remained in the closing stock weighing 1540.85 cts. The said closing stock of cut and polished diamonds was valued at cost by the appellant which gave the valuation of Rs.61,02,905/-, i.e.. the average cost per ct. of Rs.3,960.73 instead of Rs.5,994.62 per ct as adopted/estimated erroneous by AO.

**12.** As directed by the Bench the A.O. submitted the Remand Reports dated 29-04-2022 and 27-10-2022 wherein the AO acknowledged that at

pages 33 to 35 the appellant had furnished statement of purchases and statement of sales but did not furnish supporting documentary evidences such as copies of invoices of purchases and also corresponding sale invoices. The appellant in the reply dated 10-05-2022 submitted that both the AO and the Ld. CIT(A) erred in concluding that the appellant had not filed documentary evidence to justify the valuation of closing stock done by him. It is noted that the assessee submitted a chart giving details of the purchases and giving details of sales out of the said purchases and further giving the details of the closing stock remaining out of the said purchases and valuation of the same at pages 33 to 35 of the paper book. It is noted that it is not the case of the AO that either the purchases were not properly recorded or sales were not properly recorded. We also note that there is no dispute about the purchases and sales effected by the appellant during the period from 1" April, 2000 to 31" October, 2000. The whole dispute is regarding the closing stock of diamond as on 31 Oct, 2000; and it is noted that the closing stock has been valued at the purchase cost as discussed (supra). We note that this appeal pertain to AY. 2001-02 and the delay caused is mainly due to the Ld. CIT(A) not disposing of the appeal preferred by the assessee for want of "remand report" from the AO which he called for as early as 31 Jan 2006 (31.1.2006); and the AO informed the Ld. CIT(A) about the missing file only after twelve (12) years only on 11.02.2018 and the Ld. CIT(A) dismissed the appeal of assessee on the ground that assessee failed to produce documentary evidence to substantiate the valuation of closing stock of

diamond at Rs.61,02,905/-. We do not countenance this action of Ld. CIT(A). The omission [long delay of twelve (12) years) by AO to inform the Ld. CIT(A) of the missing file cannot be used against the assessee]. Be that as it may be, to put an end to the litigation, we taking into consideration the overall peculiar facts and circumstances of the case, we note that assessee had shown G.P. of 8.35% and the AO has completed G.P. at 16%. So in order to give quietus to the long drawn litigation, we estimate the G.P. at 12.5% and the AO is directed to give relief according to the assessee.

**13.** In the result, the appeal of the assessee is partially allowed.

Order pronounced in the open court on this 14/12/2022.

Sd/-

**(OM PRAKASH KANT)**  
**ACCOUNTANT MEMBER**

Sd/-

**(ABY T. VARKEY)**  
**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 14/12/2022.

*Vijay Pal Singh, (Sr. PS)*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार / (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai